

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

Kevin Turner and Shawn Wooden, on behalf of
themselves and others similarly situated,

Plaintiffs,

v.

National Football League and NFL Properties
LLC, successor-in-interest to NFL Properties,
Inc.,

Defendants.

THIS DOCUMENT RELATES TO: ALL
ACTIONS

Case No. 2:18-md-02323-AB

MDL No. 2323

The Honorable Anita B. Brody

**RD LEGAL FINANCE, LLC'S
OPPOSITION TO ANDREW STEWART'S
MOTION TO REQUIRE CLAIMS
ADMINISTRATOR TO PAY
REMAINING AMOUNT OF MONETARY
AWARD**

[Declaration of Michael D. Roth with Exhibits
filed concurrently herewith]

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I. INTRODUCTION

On January 29, 2016—more than two years ago—RD Legal Finance, LLC (“FINCO”) paid Andrew Stewart a lump sum payment of \$343,120.53 in exchange for the assignment of a portion of Stewart’s anticipated settlement award. On December 8, 2017, the Court invalidated FINCO’s assignment agreement and provided that third-party funders, such as FINCO, who accept rescission and execute a valid waiver relinquishing any rights under their assignment agreements are entitled to the return of the amounts paid to any class member.

FINCO accepted rescission of its agreement with Stewart, signed the waiver form, and thus—as the Claims Administrator and Special Masters have concluded—FINCO is entitled to the amount paid to Stewart: \$343,120.53. Although Stewart has now received his settlement award less the amount initially paid by FINCO, he now claims he is entitled to an *additional* \$90,000 that should be deducted from the amount returned to FINCO because, according to Stewart, it was used to pay off obligations *he* owed to a *different* third-party funder under a contract that was terminated in 2016. Stewart’s claim should be rejected.

The December 8 Order and the doctrine of rescission on which it is based are clear: FINCO is entitled to the return of the amount paid to Stewart, regardless of how Stewart chose to use that money. That FINCO paid the money directly to another third-party funder on Stewart’s behalf does not change the fact that FINCO paid the money pursuant to a contract that has now been rescinded and according to the Court’s suggested resolution, FINCO is entitled to the return of entire amount that it paid. In accordance with these facts, the Claims Administrator and the Special Master determined that the amount to be returned to FINCO is the full \$343,120.53.

The Court should reject Stewart’s Motion for the additional reason that, having submitted to the Special Masters’ Rules Governing Assignment of Claims (and benefitted from the Claims

Administrator's and Special Masters' conclusion that the assignment agreement is invalid), Stewart should not be permitted to use a process that is contemplated by neither the Rules Governing Assignment of Claims nor Federal Rule of Civil Procedure 53, governing objections to the findings of special masters. Similarly, Stewart's request to receive attorney's fees for opposing RD Legal's¹ prior motions to stay has no legal basis and should be rejected.

Stewart received the benefit of FINCO's significant advance to him more than two years ago, and now has received the balance of his settlement award. Stewart has thus received his award and the interest-free use of FINCO's money, and his attempt to receive additional money at FINCO's expense is unsupported by evidence, the law of rescission, the Court's December 8 Order, the Rules Governing Assignment of Claims, and equity. Accordingly, the Court should reject Stewart's unsupported attempt to squeeze an additional \$90,000 out of a transaction to which he has no legitimate claim.

II. BACKGROUND

A. *FINCO Pays Stewart \$343,120.53 in Exchange for a Portion of Future Settlement Proceeds*

Prior to entering the Assignment Agreement with FINCO, Stewart entered into two separate financing arrangements with third-party funder Ludus Capital, which were transferred to Peachtree Pre-Settlement Funding SPV, LLC ("Peachtree"). (Motion, at 1-2.)

Stewart then entered into an Assignment Agreement with FINCO dated January 26, 2016, pursuant to which FINCO paid Stewart a lump sum payment of \$343,120.53 in exchange for \$665,234.45 of his then-anticipated total award of \$2,470,000. (ECF No. 8301-9 at 23 ("In return for the Property, [FINCO] will pay to you the sum of \$343,120.53.")) At Stewart's

¹ "RD Legal" refers collectively to RD Legal Funding Partners, LP, FINCO, RD Legal Funding, LLC, and Roni Dersovitz.

direction, and under the terms of the Assignment Agreement, FINCO paid off the outstanding amounts owed to Peachtree under their financing arrangements on Stewart's behalf. (*Id.*)

Following his initial transaction with FINCO, Stewart requested that FINCO enter a second transaction with him, which FINCO declined to do.

B. The Special Masters Issue Rules Governing Assignment of Claims

On December 8, 2017, this Court held that any assignment of “monetary claims” is “void, invalid and of no force and effect” (the “December 8 Order”). (ECF No. 9517 at 4.) The December 8 Order further states that “if the Third-Party Funder is willing to accept rescission and execute a valid waiver relinquishing any claims or rights under the entire agreement creating the assignment or attempted assignment, then the Claims Administrator will be authorized to withhold—from the Class Member’s monetary award—the amount already paid to the Class Member under the agreement and return it to the Third-Party Funder.” (*Id.* at 5.) On January 4, 2018, RD Legal filed a timely Notice of Appeal of the December 8 Order. (ECF No. 9559.)

On February 20, 2018, the Court issued an order directing “that the Claims Administrator pay directly to the Settlement Class Member any and all Monetary Awards in cases where there has been found an improper assignment of any right or claim pursuant to Section 30.1 of the Settlement Agreement” (the “February 20 Order”). (ECF No. 9749.) On March 5, 2018, RD Legal filed a timely Notice of Appeal of the February 20 Order. (ECF No. 9755.)

To effectuate the Court’s December 8 and February 20 Orders, the Special Masters published “Rules Governing Assignment of Claims”² (the “Assignment Rules”) that implement a procedure for the Special Masters “to determine whether a transaction is an assignment of rights or claims prohibited by Section 30.1 of the Settlement Agreement and the Court’s [December 8

² Available at <https://www.nflconcussionsettlement.com/SettlementPgmRules.aspx> (last visited June 20, 2018).

Order].” Assignment Rules at 1. Contingent upon a waiver of any claims or rights under the assignment agreements, the Assignment Rules provide a mechanism to rescind the assignment and refund the funding advances and pay the remainder to the players, rather than having all of the funds paid directly to the players. *Id.* at 3.

C. FINCO Accepts Stewart’s Offer of Rescission After the Court Declines to Stay Its Orders Pending Appeal

In February 2018, Stewart apparently was notified by the Claims Administrator that he would be paid his Monetary Award of \$700,000 (Mtn., at 1)—far less than he had represented the award would be to RD Legal (ECF No. 8301-9 at 23).

On March 13, 2018, FINCO received from counsel for Stewart a document entitled “Waiver Relinquishing Rights Under Attempted Assignment” (“Waiver”) pursuant to “instructions from the Claims Administrator.” (Declaration of Michael D. Roth (“Roth Decl.”), Ex. 1.) Stewart’s counsel stated that FINCO may accept a rescission of its Assignment Agreement with Stewart, subject to the terms of the Waiver, and that the deadline for returning a completed Waiver is April 12, 2018. (*Id.*) RD Legal filed motions to stay proceedings pending the appeal of the December 8 and February 20 Orders, which were denied by this Court (ECF No. 9812) and then, on April 10, 2018, by the Third Circuit Court of Appeals (ECF No. 9871). Accordingly, on April 10, 2018, FINCO signed and returned the Waiver form to Stewart’s counsel and the Claims Administrator. (Roth Decl., Exs. 2-3.)

Notwithstanding that *Stewart* offered *FINCO* the opportunity to accept rescission of the assignment agreement—and that *FINCO* *accepted* that offer—Stewart’s lawyer responded to his receipt of the signed Waiver by stating that “Mr. Stewart has the right to decline the offer of a waiver” and demanded that the Claims Administrator disburse the full amount of \$343,120.53—

which the Claims Administrator was holding to return to FINCO—to Stewart. (Roth Decl., Ex. 6; *see also id.*, Ex. 4.)

Counsel for RD Legal disagreed and informed the Claims Administrator and Stewart’s counsel that Stewart’s position contradicted the Claims Administrator’s own rules for implementing the December 8 Order—which provide a mechanism for Players to contest the amount advanced by a third-party funder, but not to revoke the offer of rescission:

Rule 8(b) of the Rules Governing Assignment of Claims covers this situation and provides: “If the Settlement Class Member has not agreed to the amount advanced that has not been repaid, the Claims Administrator and the Special Master will determine the correct amount from the materials submitted.”

(Roth Decl., Ex. 5; *see also id.*, Ex. 7.)

The Claims Administrator agreed with the interpretation of the rules and informed RD Legal that during the process the Special Master and Claims Administrator had agreed with the amount RD Legal sought through the rescission process. (*Id.* at ¶ 9.) The Claims Administrator thus refused both Stewart’s demand to revoke rescission and for an additional \$90,000, and has been holding the \$343,1200.53 since.

In Stewart’s instant Motion to Require Claims Administrator to Pay Remaining Amount of Monetary Award, Stewart retreats from his position that he is entitled to the full \$343,120.53, and instead demands that the Claims Administrator disburse to him \$90,000 of that amount, representing funds that FINCO paid to another funder on Stewart’s behalf in January 2016 and to which FINCO is entitled.

III. THE COURT SHOULD DENY STEWART'S MOTION

A. *FINCO Is Entitled to the Full Purchase Price Paid Under the Assignment Agreement*

As stated in the Court's December 8 Order, reiterated in the Waiver signed by FINCO, and set forth in the letter from Stewart's counsel, the Court permitted third-party funders such as FINCO to accept rescission of their assignment agreements and receive "the amount already paid to the Class Member under the [assignment] agreement." (ECF No. 9517 at 5.) "It is well known that the purpose of equitable rescission is to return the parties as nearly as possible to their original positions where warranted by the circumstances of the transaction." *Baker v. Cambridge Chase, Inc.*, 725 A.2d 757, 766 (Pa. Super. 1999); *see also In re Fowler*, 425 B.R. 157, 209 (Bankr. E.D. Pa. 2010) (purpose of rescission "is to restore, insofar as possible, the status quo ante").³ To return FINCO to its original position and restore the status quo, the original purchase price paid by FINCO—\$343,120.53—must be returned.

Stewart's claim that the full payment of \$343,120.53 was not "paid to [him]" (Mot. at 3) is patently false. FINCO agreed to "pay to [Stewart] the sum of \$343,120.53" and in fact did make that payment. (*See* Roth Decl., at ¶ 6, Ex. 5.) That a portion of that payment was, at Stewart's direction, used to satisfy an obligation on Stewart's behalf, does not alter the fact that it was money paid for Stewart's benefit under the terms of the Assignment Agreement and must be returned to FINCO in order to "return the parties as nearly as possible to their original positions." *Baker*, 725 A.2d at 766.

³ The same principle applies under New Jersey law, which governs the Assignment Agreement. *See Intertech Assocs., Inc. v. City of Paterson*, 255 N.J. Super. 52, 59 (App. Div. 1992) (stating that the purpose of rescission is to "return the parties to the 'ground upon which they originally stood.'").

Stewart maintains that the \$343,120.53 should be reduced by \$90,000, because it “constituted fees, charges, payments or interest [owed to Peachtree] that this Court has now determined to be void and illegal.” (Mot. at 3.) Stewart concedes, however, that those contracts with Peachtree were “terminat[ed]” upon FINCO satisfying Stewart’s obligations January 2016 (Mot. at 2) and thus could not have been subject to the Court’s December 8 Order issued nearly two years later. And while Stewart asks the Court to accept his representation that the Peachtree contracts “hypothetically” would have been void (Mot. at 4), Stewart provides no basis for this assertion—which apparently neither the Claims Administrator nor Special Masters accepted—and did not even submit the contracts to the Court.⁴

It is undisputed that FINCO paid \$343,120.53 under an Assignment Agreement that, at Stewart’s request, FINCO agreed to rescind, and the Court should reject Stewart’s attempt to reduce the amount to which FINCO is entitled.

B. The Court Should Deny Stewart’s Attempt to Avoid the Special Master Process

The Court should deny the Motion for the additional reason that it is procedurally improper. Rule 8(b) of the Assignment Rules covers the situation where a third-party funder has returned a signed waiver form but the class member does not agree with the amount advanced: “If the Settlement Class Member has not agreed to the amount advanced that has not been repaid, the Claims Administrator and the Special Master will determine the correct amount from the materials submitted.” The Assignment Rules do not provide for any review by the Court of the determination made by the Claims Administrator and the Special Masters. Having availed himself of the Assignment Rules process—and benefited from the determination that his

⁴ If Stewart believes his assignments with Ludus Capital/Peachtree should be invalidated, he can commence an action against Ludus and Peachtree to recover his money. Refusing to repay RD Legal because Stewart believes he erred in repaying Peachtree is illogical and unsupported by the facts and the law.

agreement with FINCO is void—the Court should not allow Stewart to do an end-run around that same process by seeking a different result from the Court.

If Stewart is permitted to seek review of the Special Masters’ determination regarding the amount to be returned to FINCO, Stewart’s Motion violates that procedure as well. Federal Rule of Civil Procedure 53(f) provides the procedure and standards for a Court’s review of a Special Master’s “order, report, or recommendation,” Fed. R. Civ. P. 53(f), but no such order, report, or recommendation has been submitted to the Court for review. Instead, Stewart asks the Court to reject the Claims Administrator’s and Special Master’s conclusions based on Stewart’s say-so, without the benefit of those conclusions, evidence, or any law.

There is simply no procedural basis for Stewart’s improvident Motion—under both the Assignment Rules and the Federal Rules of Civil Procedures—and thus it should be denied.

C. The Court Lacks Jurisdiction to Rule on Stewart’s Motion

To the extent Stewart is requesting that the Court modify the December 8 Order or the February 20 Order, the Court also lacks jurisdiction to rule on the Motion. The filing of the Notices of Appeal as to the December 8 Order and February 20 Order “divest[ed] the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). “‘Divest’ means what it says—the power to act, in all but a limited number of circumstances, has been taken away and placed elsewhere.” *Venen v. Sweet*, 758 F.2d 117, 120-21 (3d Cir. 1985).

Here, the Court has been divested of jurisdiction over issues implicated by the December 8 Order, *i.e.*, the effect of the Settlement Agreement on the assignment agreements and any corresponding determination regarding the distribution of funds that are subject to the Assignment Agreements, and the February 20 Order, *i.e.*, payments to class members “where

there has been found an improper assignment of any right or claim pursuant to Section 30.1 to the Settlement Agreement.” (ECF No. 9749.) A ruling on Stewart’s Motion modifying the right to rescission (*i.e.*, altering the right for FINCO to receive the money it paid as is required under the law of rescission), would require the Court to revisit both of these issues and thus is outside of its jurisdiction.

D. The Court Should Reject Stewart’s Request for Attorney Fees

Stewart also requests attorney fees for opposing RD Legal’s stay motion because it “directly and immediately threatened to prevent Mr. Stewart from receiving any distribution of his Monetary Award whatsoever.” (Mot. at 5.) The Court should reject this belated and illogical request for a number of reasons.

First, attorney fees and costs are not recoverable unless authorized by statute or contract, *see Medevac MidAtlantic, LLC v. Keystone Mercy Health Plan*, 817 F. Supp. 2d 515, 533 (E.D. Pa. 2011) (applying Pennsylvania law); *Berwyn Capital Investments, Inc. v. Shore Venture Grp., LLC*, No. 01-civ-00691, 2006 WL 1687209, at *1 (E.D. Pa. June 19, 2006) (applying New Jersey law), and Stewart cites neither. *See* Fed. R. Civ. P. 54(B)(ii) (motion for fees must set forth the statute or rule authorizing fees). For this reason alone, Stewart cannot recover his fees.

Second, motions for fees and costs must be made within 14 days after the judgment or order for which fees are sought. Fed. R. Civ. P. 54(B)(i). Here, the Third Circuit denied RD Legal’s stay motion on April 10, 2018, and Stewart’s motion for fees was filed more than two months later. He also made no attempt to meet the other requirements for a motion for fees and costs (Fed. R. Civ. P. 54(B)(ii-iii), and these procedural failures provide another independent basis to deny his motion.

Third, RD Legal's motions to stay were denied and thus did *not* "prevent Mr. Stewart from receiving any distribution of his Monetary Award." To the contrary, Stewart admits that he has received his full monetary award, less the amount owed to FINCO. (Mot. at 2.)

Fourth, the motions to stay did not even *delay* Stewart's receipt of the Monetary Award, which he received on April 7, 2018. (*Id.*) Indeed, RD Legal filed its motions for stay on an expedited basis in order to obtain a ruling prior to the deadline for returning a signed Waiver, and, despite filing the motion, Stewart received his Monetary Award prior to the Third Circuit's ruling on the motion to stay. Moreover, from the start of these issues, FINCO has consistently taken the position that any undisputed amounts should be released to Stewart and has focused its recovery efforts exclusively on the contractually-disputed amounts. (*See* ECF No. 8910.) The delays that Stewart experienced were thus not the result of any motions filed by RD Legal but, to the extent they occurred, were the result of other factors common to other class members.

Fifth, there is nothing equitable about Stewart's request. Under Stewart's theory, Ludus Capital would receive the full benefit of its funding contracts (which have not been rescinded), Peachtree would receive the full benefit of its funding contracts (which have not been rescinded), Stewart would receive the use of \$253,120.53 interest free (plus attorney's fees), and FINCO would be out-of-pocket over \$100,000. That is not equity.

Finally, Stewart's reliance on equitable principles (Mot. at 5) overlooks Stewart's own sophistication with third-party funders—which has included entering three funding agreements and a rejected request to enter a fourth—and disingenuous tactics to maximize the amount he recovers, which here includes initially offering rescission to FINCO; then demanding that the Claims Administrator pay him the full \$343,120.53 due to FINCO (Roth Decl., Ex. 3); and now claiming he is entitled to an additional \$90,000 while ignoring that those funds were used to pay

off obligations for his benefit. Stewart has realized a significant benefit from the Court's December 8 Order—essentially a two-year interest free loan of \$343,120.53—and the Court should reject any request for additional funds.

IV. CONCLUSION

For the reasons above, RD Legal respectfully requests that the Court deny Andrew Stewart's Motion to Require Claims Administrator to Pay Remaining Amount of Monetary Award.

Dated this 26th day of June, 2018.

Respectfully submitted,

/s/ Michael D. Roth
BOIES SCHILLER FLEXNER LLP
MICHAEL D. ROTH

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Opposition to Andrew Stewart's Motion to Require Claims Administrator to Pay Remaining Amount of Monetary Award was served electronically via the Court's electronic filing system on the date below upon all counsel of record in this matter.

Dated: June 26, 2018

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